NO. 82-5590

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

ERNEST LEE MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. WHETHER THE REFUSAL OF STATE COURTS IN CAPITAL CASES TO PROVIDE GRAND JURY TESTIMONY OF PROSECUTION WITNESSES WHO HAVE GIVEN EXCULPATORY AND INCONSISTENT STATEMENTS -- AND WHOSE TESTIMONY FORMS THE BASIS FOR THE DETERMINATION OF GUILT AND SENTENCE OF DEATH -- PRESENTS AN IMPORTANT FEDERAL QUESTION?

2. WHETHER THIS COURT'S DEATH PENALTY DECISIONS WERE WRONGLY CONSTRUED AS REQUIRING EQUALIZED DEATH SENTENCES FOR CO-PARTICIPANTS IN A MURDER -- NOTWITHSTANDING THE INDIVIDUAL DIFFERENCES OF PETITIONER OR THE RECOMMENDATION OF LIFE BY HIS JURY?

3. WHETHER THE FLORIDA COURTS' EXCLUSION OF MITIGATING TESTIMONY, CONCERNING REHABILITATIVE CAPACITY, CONFLICTS WITH APPLICABLE DEATH PENALTY DECISIONS OF THIS COURT?

4. WHETHER RECENT DEVELOPMENTS RENDER FLORIDA'S JURY OVERRIDE OF LIFE SENTENCE UNCONSTITUTIONAL -- AT LEAST WHERE A STATUTORY MITIGATING FACTOR IS ESTABLISHED?

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed by this petition is reported as Miller v. State, 415 So.2d 1262 (Fla. 1982).

JURISDICTION OF THE COURT

Respondent agrees that jurisdiction is properly invoked pursuant to 28 USC §1257(3) and the Court can exercise jurisdiction to the extent that a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

3. The Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Pasco County on August 29, 1979, charged Ernest Lee Miller and his step brother, William Jent, with the premeditated murder of a girl identified as "Tammy." Subsequent to their pleas of not guilty, they filed several pre-trial motions.

The court granted a State Motion to Sever and Miller proceeded to trial. He was convicted as charged. Jent proceeded to trial on December 17, 1979, and was also convicted as charged.

Subsequently, the court sentenced Miller and Jent to death. The court found as aggravating circumstances that: (1) the murder was especially heinous, atrocious and cruel, and (2) it was committed in a cold and calculated manner without any pretense of moral or legal justification. the Court fould in mitigation only that Miller had no significant history of prior criminal activity.

The Florida Supreme Court affirmed the lower court's judgment and sentence. Miller v. State, 415 So.2d 1262 (Fla. 1982).

STATEMENT OF THE FACTS

Respondent will rely on the facts as contained in the Florida Supreme Court opinions reported as Miller v. State, 415 So.2d 1262 (Fla. 1982) and Jent v. State, 408 So.2d 1024 (Fla. 1981). Respondent will also rely on the following facts from the record:

Miss C.J. Hubbard acknowledged that she had been drinking during the evening of the murder, however, a review of her testimony reveals that her recollection of the events that transpired was quite clear. Miss Hubbard was able to relate where she had been (R1168-1171); who she was with (R1171-1172,1181); and the events leading up to the murder (R1182-1192).

When Hubbard arrived at the river tressel, she went on a walk with John (R1182-1183). Shortly thereafter, Hubbard heard male screaming voices (R1183). Hubbard also heard the

fearful screams of a female (R1181). Hubbard paid no attention to this, because she simply figured the party was getting rowdy (R1183). When Hubbard and Johnny returned to where the others were swimming, Hubbard saw Miller and Jent beating a girl in the face (R1183-1184). After the beating, someone suggested that everyone leave (R1186). They got in Miller's car and drove to his house (R1186-1187). Afterwards, Samantha, Johnny, George, Trisha, Ricky, Glenna, Bill and Miller drove to another location in his car (R1188-1189). Miller and Bill jumped out of the car, went to the trunk (R1189) and shortly thereafter, Miller came back and told everyone to get out of the car (R1189). Patricia was extremely sick at the time (R1189). Hubbard looked over and saw Miller pour gasoline over the girl's body. The next thing she saw was the girl's body going up in flames (R1190).

While Miss Hubbard's story changed prior to trial, the reason is clearly apparent. Miss Hubbard was afraid of Miller and what he might do to her (R1208).

Miss Glenna Frye testified that on the evening of the murder she went to the river tressel with Miller (R1312-1317). Samantha, William Jent and Ricky were already there when she arrived (R1316). She and Miller went to Miller's house to get some crystal tea (R1317-1318). Miller lived very close to the river tressel (R1317). Glenna did not take any narcotics while she was there (R1317). When they returned to the river tressel, Glenna observed a marked police cruiser (R1318-1319). Glenna and Miller parked the car and walked 300 to 400 yards down to the tressel (R1320). When they reached the swimming hole, Miller told all the juveniles to leave (R1321).

Sometime thereafter, Glenna observed Samantha in a fight with another girl (R1321). The two girls were fighting over Jent (R1322,1363). The girl had come to the river tressel with two other people, however Glenna did not know how they

got there (R1322). Jent grabbed Samantha, threw her off the girl and started hitting the girl (R1323). Jent was punching Tammy in the face while Miller hit her with a stick (R1323-1324). Glenna had handed the stick to Miller at his request (R1323). Glenna complied out of fear (R1323,1328).

Tammy was struggling to get away when Glenna heard her scream out in pain. Blood was coming from Tammy's nose (R1371). Miller struck Tammy with the stick several times to the head (R1329). Glenna did not know whether Jent hit Tammy with the stick (R1368). Glenna did not attempt to intercede, out of fear (R1329). Glenna walked over to where the rest of the group was standing and when she turned around, Miller had stopped hitting Tammy (R1329-1330). Miller ordered Glenna to help him with the girl, but she refused (R1330). Miller then told Jent to help (R1330). Miller and Jent each grasped one of Tammy's arms and took her to the car (R1330). In the meantime, Miller had told Frye to start gathering up all their belongings (R1330). As they were leaving the tressel, they drove up to a van which was stuck in the sand (R1331). The driver of the van had walked up to the river tressel with Tammy (R1331,1355). After they helped to get the van out of the sand, the van made a right turn while the rest of the group went to the left to Miller's home (R1331,1332).

Samantha, Jent, George, Patricia, Ricky, George and Miller were all standing around while Tammy was being beaten (R1331). The two individuals from the van were also present (R1331). During the beating, Glenna heard Miller and Jent call the girl Tammy and she responded (R1332).

After stopping at Miller's house, everyone got back into his car, except for Ricky, who was passed out on the floor (R1332-1333). Miller drove to the Richloam Game Reserve in Lacoochee which was only a couple of miles from his home (R1333). Miller stopped the car and told everyone to get out. Everyone complied with his instructions and followed Miller to the rear of the car (R1333). Miller opened the trunk, picked

Tammy up by the arms while Jent picked her up by her legs (R1334). When Miller and Jent initially had put her in the trunk of the vehicle, Tammy was clothed, however, Glenna did not believe that Tammy was wearing anything when they took her out of the trunk at the Richloam Game Reserve (R1334). Miller and Jent then carried Tammy's body off to the front of the car (R1334). Samantha was carrying a container of gasoline (R1335). Glenna believed that she saw Miller pour the contents of the container (R1335). The next thing she saw was the girl's body burning (R1335). Miller, Jent and Samantha stood around the girl while she burned (R1335). Glenna was standing just behind them and C.J. Hubbard was just behind her (R2335). Patricia was screaming at the time (R3336). Glenna did not see who ignited the body because she was attempting to keep an eye on Patricia (R1336). Glenn identified State's Exhibit H as the girl known as Tammy who was beaten at the river tressel by Miller (R1336-1337). Glenna further testified that this was the same person who was set on fire at the Richloam Game Reserve (R1337).

ARGUMENT

ISSUE I

WHETHER THE REFUSAL OF STATE COURTS IN CAPITAL CASES TO PROVIDE GRAND JURY TESTIMONY OF PROSECUTION WITNESSES WHO HAVE GIVEN EXCULPATORY AND INCONSISTENT STATEMENTS -- AND WHOSE TESTIMONY FORMS THE BASIS FOR THE DETERMINATION OF GUILT AND SENTENCE OF DEATH -- PRESENTS AN IMPORTANT FEDERAL QUESTION?

This Court has long recognized the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." United States v. Proctor and Gamble Co., 356 U.S. 677, 681, 2 L.Ed 2d 1077,1081, 78 S.Ct. 983 (1958). Occasionally, limited inquiry is permitted and disclosure ordered relating to grand jury matters, but only when the movant has made a showing of "particularized need." Smith v. United States, 423 U.S. 1303,1304, 96 S.Ct. 2, 3, 46 L.Ed 2d 9 (1975); Dennis v. United States, 384 U.S. 855, 16 L.Ed 2d 973, 86 S.Ct. 840 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400, 3 L.Ed 2d 1323, 1327, 79 S.Ct. 1237 (1959); United States v. Weinstein, 511 F.2d 622, 627 (2nd Cir. 1975), cert. denied, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed 2d 693 (1975). There are several interests served by safeguarding the confidentiality of the grand jury proceedings:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.
>
> For all of these reasons, courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury.

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211,219, 60 L.Ed 2d 156, 99 S.Ct. 1667 (1979).

Under Rule 6(e), Federal Rules of Criminal Procedure,[1] parties seeking grand jury transcripts must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy and that their request is structured to cover only material so needed. Douglas Oil Co. v. Petrol Stops Northwest, supra at 441 U.S. 222. The rationale behind this rule was aptly stated by Judge Learned Hand in United States v. Garrison, 291 F. 646 (D.C. N.Y. 1923):

> "I am no more disposed to grant it than I was in 1909. United States v. Violon, C.C. 173 F. 501. It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it and I hope none ever will. Under our criminal procedure, the accused has every advantage. While our prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence: he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure and make his defense fairly or foully, I have never been able to see * * *"

Section 905.27(1), Florida Statutes (1979), provides in relevant part as follows:

> (1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of
>
> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

[1] Rule 6(e), Federal Rules of Criminal Procedure provides:

(e) Secrecy of Proceedings and Disclosure.

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

(emphasis added)

Section 905.27(1) is entirely consistent with Federal Rule 6(3). It provides that a defendant does not have an absolute right to view a transcript of grand jury testimony. State v. Drayton, 226 So.2d 469 (Fla.2d DCA 1969). Except where a charge of perjury or subornation of perjury is based, an accused has no right to inspect, in advance of trial, the grand jury testimony of witnesses who will be called by the State to testify against him at trial. Minton v. State, 113 So.2d 881 (Fla. 1959). When the purposes of secrecy are accomplished and a disclosure becomes essential to the attainment of the truth, the rules of secrecy surrounding the grand jury proceedings may be released in the discretion of the court. Trafficante v. State, 92 So.2d 811 (Fla. 1957). Here, Petitioner's motion for leave to inspect the grand jury testimony was for the sole purpose of determining whether eyewitnesses testified at deposition as they did before the grand jury. Petitioner's motion was based on pure surmise and speculation. Petitioner's reference to Eddings v. Oklahoma, 102 S.Ct. 869 (1982) is misplaced. As the Florida Supreme Court aptly noted in Jent v. State, supra, defense counsel, through cross-examination was able to draw attention to the inconsistencies between each one's trial testimony and her previously given deposition. If, as defense counsel stated, he sought grand jury testimony in order to attack these witnesses' credibility, the cross-examination obviated the need for their prior testimony. The court also found that petitioner had failed to present a sufficient predicate.

Petitioner's reliance on United States v. Augenblick, 393 U.S. 348, 356 (1969) is also in error. This decision

concerns the administration of the Jencks Act. While this act provides that a government witness who testifies may be required to produce any statement which relates to his testimony, it is in nowise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes. See Pittsburgh Plate Glass Co. v. United States, supra at 360 U.S. 375, 398.

Petitioner contends that Florida Courts have enacted an insurmountable barrier between a defendant and the grand jury proceeding. Petitioner's contention is ridiculous. Section 905.27(1), Florida Statutes presents no more of a barrier than its federal counterpart, Rule 6(e), Federal Rules of Criminal Procedure. Where a defendant fails to make a showing of particular need, the trial court should deny him access to the grand jury proceedings. No such showing was made.

ISSUE II

WHETHER THIS COURT'S DEATH PENALTY DECISIONS WERE WRONGLY CONSTRUED AS REQUIRING EQUALIZED DEATH SENTENCES FOR CO-PARTICIPANTS IN A MURDER -- NOTWITHSTANDING THE INDIVIDUAL DIFFERENCES OF PETITIONER OR THE RECOMMENDATION OF LIFE BY HIS JURY. . 2/

As ground two of the Certiorari petition, defense counsel argues that the trial court erroneously applied a "consistency doctrine" as an additional factor in sentencing Petitioner to death. Respondent would initially point out that this issue was not presented in this light in State court.

In Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed 2d 336, 89 S.Ct. 1162 (1969), this Court held that unless it appears on the record that a federal question was both raised and decided in the State court, this Court's appellate jurisdiction fails:

> ". . .It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809) and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet 368,391, 9 L Ed 458,467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nichols, 4 Wheat 311, 315, 4 L Ed 578,579 (1819), and since, e.g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn, Inc., 360 US 334,342,n.7, 3 L.Ed 2d 1280,1286, 79 S.Ct. 1196 (1959): State Farm Mutual Automobile Insurance Co. v. Duel, 324 US 154,160-163,80 L.Ed 812, 817-819, 65 S.Ct. 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434-435,84 L.Ed 849,851-852, 60 S. Ct. 670 (1940); Whitney v. California,274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S.Ct. 641 (1927); Dewel v. Des Moines, 176 US 193, 197-201, 43 L.Ed 665,667-668,19 S. Ct. 379 (1899); Murdoch v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875 . . ."

2/ Petitioner states that the trial court found the existence of only one aggravating circumstance. Petitioner is in error. A review of the sentencing order reveals that the court found two aggravating circumstances to exist, (1) cold, calculated and premeditated, and (2) heinous, atrocious and cruel. (See Appendix 1-7).

See also Stanley v. Illinois, 405 US 645, 658, n.10, 31 L.Ed 2d 551, 92 S.Ct. 1208 (1972; Hill v.California, 401 US 797,28 L. 2d 484, 91 S.Ct. 1106 (1971).

Even if this Court were to determine that Petitioner has standing to make his arguments at this time, the petition for certiorari should still be denied. Florida's death penalty statute was approved by this Court in Proffitt v. Florida, 428 US 242, 49 L.Ed 2d 913, 96 S.Ct. 2960, reh. den. 429 US 875, 50 L Ed 2d 158, 97 S.Ct. 197, 198 (1976). Florida's sentencing procedure is based on a rational system of equal culpability - equal treatment where a variation between the defendants is minimal. Compare Barclay v. State, 343 So.2d 1266 (Fla.1977), cert denied 439 US 892 (1978). Contrary to counsel's observation the trial judge examined the individual characteristics of each defendant and in view of the jury recommendation gave greater weight to the mitigating circumstances in Miller's case, however he found their participation to be equally aggressive and malevolent without any substantive difference to distinguish the two defendants. He, therefore overrode the jury recommendation.

Peritioner emphasizes the doctrine of consistency far beyond *rational limits*. A simple review of the trial court's sentencing order reveals that "consistency" was not the motivation behind the imposition of the Petitioner's death sentence. This decision was reached only after an exhaustive examination of the individual facts and circumstances of each defendant. Petitioner's argument is totally without merit.

ISSUE III

WHETHER THE FLORIDA COURTS' EXCLUSION OF MITIGATING TESTIMONY, CONCERNING REHABILITATIVE CAPACITY, CONFLICTS WITH APPLICABLE DEATH PENALTY DECISIONS OF THIS COURT?

Under Florida law, the issue of whether a trial court erred in excluding defense witness testimony cannot be considered on appeal in the absence of a proffer in the trial court. Bennett v. State, 405 So.2d 265 (Fla 4th DCA 1981); Phillips v. State, 351 So.2d 739 (Fla 3d DCA 1977). Without such a showing it is impossible for the appellate court to determine whether the proposed evidence is admissible. Haager v. State, 83 Fla. 41, 90 So. 812 (Fla. 1922). Henry v. State, 81 Fla. 863, 89 So. 136 (Fla. 1921); Piccirrrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976); and Francis v. State, 308 So.2d 174 (Fla. 1st DCA 1975).

In the present case, defense counsel believed that Dr. Merin might testify as to rehabilitative capacity (R1444-1446). 3/ but he really wasn't sure. The trial judge responded, stating that he wasn't going to suppress any of the Doctor's testimony, because he did not know what it would be (R1546). While the trial judge later ruled that the witness was not to discuss rehabilitative capacity (R1568), Petitioner never attempted to develop this line of questioning by way of a proffer (R1582-1599). 4/

In Lockett v. Ohio, 438 US 586,604, 57 L.Ed 2d 973, 98 S. Ct. 2954 (1978), this Court held that the Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

3/See Appendix 2.

4/See Appendix 3.

While evidence of rehabilitative capacity could be relevant to the mitigation of a death sentence, Gardner v. Florida, 430 U.S. 349, 360 (1977), there was no showing by Petitioner that Dr. Merin was competent to present any evidence on the subject. Since Petitioner never submitted a proffer of Dr. Merin's testimony on this subject, it cannot be said that the trial court erred.

ISSUE IV

WHETHER RECENT DEVELOPMENTS RENDER FLORIDA'S OVERRIDE OF LIFE SENTENCES UNCONSTITUTIONAL -- AT LEAST WHERE A STATUTORY MITIGATING FACTOR IS ESTABLISHED?

Petitioner complains because Florida's death penalty statute allows a trial court to impose a death sentence despite a jury recommendation of life imprisonment. At the risk of being repetitive, Respondent would again point out that the issue as framed was neither presented to, nor decided by the State courts of Florida. Clearly, Petitioner is without standing to present this issue. This Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. See Webb v. Webb, 451 U.S. 493, 68 L.Ed 2d 392, 101 S.Ct. 1889 (1981); Tacon v. Arizona, 410 U.S. 351, 352, 35 L.Ed 2d 346, 93 S.Ct. 998 (1973); Moore v. Illinois, 408 U.S. 786, 799, 33 L.Ed 2d 706, 92 S.Ct. 2562 (1972); University of California Regents v. Bakke, 438 U.S. 265, 57 L.Ed 2d 750, 98 S.Ct. 2733 (1978).

Even assuming Petitioner presented this issue to the state court (which he did not), his claim is meritless. This Court has already expressed approval of Florida's sentencing procedures in death penalty cases. See Proffitt v. Florida, supra and Dobbert v. Florida, 432 U.S. 282 (1977).

CONCLUSION

Based upon the foregoing reasons and authorities, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Michael Sandler, Esquire, Steptoe and Johnson, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036 on this the 24th day of November, 1982.

Michael J. Kotler

Of Counsel for Respondent

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

CF79-847

STATE OF FLORIDA :
:
vs :
:
WILLIAM RILEY JENT; :
EARNEST LEE MILLER :

FINDINGS IN SUPPORT OF SENTENCES

On November 15, 1979, Earnest Lee Miller was convicted by a jury of the first degree murder of a girl known only as Tammy. That same jury recommended a life imprisonment sentence for Mr. Miller. On December 20, 1979, a different jury also convicted William Riley Jent of first degree murder in the same incident. That same jury recommended a death sentence for Mr. Jent.

It is now this Court's duty to sentence both Earnest Lee Miller and William Riley Jent for the first degree murder of a girl known only as Tammy.

In preparing to exercise that duty, this court carefully reviewed the Florida law relating to sentencing in capital cases (§921.141, Florida Statutes, and cases listed in appendix) and also carefully reviewed the application of the principles of the United States Constitution to sentencing in capital cases. Furman v. Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972); Proffitt v. Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973).

This court presided over the trials of both defendants. A pre-sentence investigation was not considered by this Court to offer any assistance in this case and was not requested. It is not required. Thompson v. State, 328 So.2d 1, 4 (Fla. 1976).

Florida law only allows two choices in imposing sentences for capital felonies: life imprisonment with a mandatory minimum service of 25 years before being eligible for parole, or death. §775.082, Florida Statutes.

The Florida Legislature has also established guidelines to control and direct the exercise of the sentencing court's discretion

in selecting and imposing the proper sentence in capital cases. §921.141, Florida Statutes. Under these guidelines, the Court must consider and weigh certain specified aggravating and mitigating circumstances.

From all of the evidence available, this Court finds the following aggravating circumstances to exist in this case:

1. §921.141(5)(h), Florida Statutes. This murder was especially heinous, atrocious and cruel. These two defendants, in concert, beat this girl to unconsciousness, loaded her into an automobile, drove her to an isolated home of the defendant Miller, took her out of the automobile still unconscious, stripped her of her clothing, threw her onto the trunk (or hood) of an auto, subjected her to rape by four men while requiring several other girls to watch, dumped her unceremoniously back into the trunk of an auto, drove her to a secluded spot in the Withlacoochee State Forest, drug her out of the auto trunk, carried her into the bushes, poured gasoline on her, beat her back down when she tried to get up, then immolated her and left her to the processes of final degradation--acts epitomical of "wicked," "shockingly evil," and "vile." Furthermore, these acts demonstrated the defendants to not only be pitiless, but the public gang rape of this victim during the perpetration of this murder demonstrated these defendants' enjoyment of the suffering of the nameless victim. Even the imagination of Hollywood at its most macabre is paled by the cruelty, the heinousness and the atrocity of this murder.

2. §921.141(5)(i), Florida Statutes. This crime was certainly committed by these two defendants in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Counsel for the defendants argued that the defendants must have thought the girl was dead following the first beating on the bank of the Withlacoochee River and that the remainder of their atrocities were seemingly committed on a lifeless corpse. However, even ignoring the testimony during the trial of the defendant Jent that the girl tried

to sit up after the gasoline was poured on her, but before she was ignited. This Court cannot believe these defendants could for over an hour drag this girl in and out of automobiles, strip her clothes from her body and each rape her while she was lying on the trunk of an auto without realizing that she was warm, flexible and alive.

The conduct of the defendants was so callous in this case, however, that these two aggravating circumstances seem to blend into one.

None of the other aggravating circumstances are found to apply.

Having found aggravating circumstances to apply, the Court must consider any mitigating circumstances. Upon application of the available evidence in this case to the statutory mitigating circumstances, the Court finds as follows:

1. §921.141(6)(a), Florida Statutes. The defendants have no significant history of prior criminal activity. This mitigating circumstance applies to both defendants.

2. §921.141(6)(b), Florida Statutes. There was no evidence that this crime was committed while either defendant was under the influence of any mental or emotional disturbance. This mitigating circumstance does not apply to either defendant.

3. §921.141(6)(c), Florida Statutes. There was no evidence that the victim in this case was a willing participant in the defendants' conduct or consented to the acts culminating in her death. This mitigating circumstance does not apply to either defendant.

4. §921.141(6)(d), Florida Statutes. The defendants were accomplices in this crime but the participation of each defendant was equally aggressive and malevolant. Furthermore, no evidence indicated that either defendant acted under any duress or any domination of another person. At the sentencing phase of the trial of defendant Miller, Dr. Sidney Merin, a psychologist, did testify that Miller was a social follower. The jury may have been emotionally impressed with this personality appraisal. The jury recommended life imprisonment for Miller. But that appraisal does not square with he facts in

this case. The eyewitness' testimony indicated that each of these defendants tried to out-atrocity the other in killing this girl. This Court finds that neither of these mitigating circumstances applies to either of these defendants.

5. §921.141(6)(f), Florida Statutes. Dr. Merin testified that the defendant Miller had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. The evidence supports this appraisal for both Miller and Jent. They both knew the criminality of their conduct and were able to conform their conduct to the requirements of the law. The evidence indicates they enjoyed their heinous abandon. This mitigating circumstance does not apply to either defendant.

6. §921.141(6)(g), Florida Statutes. Jent was 28 years old and Miller 23 years old at the time of this crime. Both were of sufficient age that this mitigating circumstance does not apply to either.

After weighing the aggravating and mitigating circumstances existing in this case and comparing them to the circumstances found to be existing in most (if not all) of the death sentences reviewed by the Florida Supreme Court since 1972 (see appendix), this Court believes the aggravating circumstances of this case do outweigh the mitigating circumstances and a death sentence to be demanded for both defendants.

The jury that tried defendant Miller recommended life imprisonment for him. The Jent jury recommended death. In view of the Miller recommendation this Court is required to give "greater weight" to the mitigating circumstances for him. Beckren v. State, 355 So.2d 111 (Fla. 1978). That jury weighed and considered the same aggravating and mitigating circumstances that have been weighed by this Court. Although this Court is not bound by the advisory sentencing verdicts, they do represent a direct expression of the social conscience of an informed

the Constitutional standards espoused in Furman v. Georgia, supra, and Proffit v. Florida, supra, it is the judgment of this Court that both William Riley Jent and Earnest Lee Miller be put to death in the manner provided by Florida law for the first degree murder of a girl known only as Tammy.

DONE AND ORDERED in Chambers, Dade City, Pasco County, Florida, this 20 day of February, 1980.

WAYNE A. COBB, Circuit Judge

Copies furnished to:

Office of the State Attorney
Leonard J. Holton, Esquire
Larry S. Hersch, Esquire

[illegible] match, did he [illegible] you have any [illegible] before you [illegible] says he [illegible] match? Anybody [illegible] [illegible]ely none. [illegible] and ought [illegible] know he's not [illegible] [illegible]th [illegible]ing a match. The State didn't [illegible] [illegible]ed today [illegible] yesterday or the day before yesterday and say, Farnie [illegible], you lit that match and you set that girl on fire. [illegible] not right. He's not charged with lighting that [illegible] he's charged with, and I've always [illegible]ed the [illegible]age, with participating in and being responsible for [illegible] murder. And here's why. There are other people [illegible]ved. There's a codefendant there, William Riley [illegible]. And there's another reason, ladies and gentlemen, [illegible] that reason is an instruction which I believe the [illegible] will give you that is called the principal [illegible] instruction and it stands for this proposition which was [illegible]tioned during voir dire, a person may commit a crime [illegible] his own personal act. Okay. Or through the act or [illegible] of another person. Any person. In other words, he [illegible] commit a crime through the act or acts of another [illegible] [illegible] [illegible] counsels, [illegible] [illegible] or otherwise procures the commission of a crime [illegible] [illegible]ly guilty [illegible] the one who actually [illegible] [illegible]orms the [illegible] act, [illegible] or not present [illegible] commission [illegible] [illegible] whether or not [illegible]. However [illegible] [illegible] instruction [illegible] will

...this to you ... the law, but I ... Judge's
... for one
... crime ... ...rted by
...er. It is necessary that he have a ... ...ous intent
...that the criminal act should be done and that
...ant to that intent he do some act or say some word,
...use a word ... which ... intended to
...often directly ... cause, encourage, assist or
... another person to actually commit the crime. Well
... and ... this defendant beat the girl. This
...dant carried her to his car with the help of Jene.
...defendant drove his car. This defendant went to
... house. This defendant drove Sandy to the Richloam
...reserve. This defendant, with Jene, carried the
... out of the car. This defendant pours gas on her
... this defendant was standing right there, right next
...Sandy, as you'll see in these pictures, you'll see
... in these pictures, right here is Sandy and standin
...and Jene and, according to the eyewitnesses, numbe
... - because ... Mr. C. J.
...
...ore ... state ... prove ... to you,
...beyond, ... a doubt, ... that ...
...that right ... is guilty. ... is
...ty, and the only, ... by or
...ple ... according right ... ...ered

[illegible] that is done by myself.

Q [illegible], you indicated you had a history [illegible]

A Yes.

Q [illegible] indicate his [illegible]

A Yes. Miller is [illegible] years of age.

Q And [illegible] his marital [illegible]

A Yes. He told me he was [illegible] that he had been separated from his wife for about the past year or so.

Q Did [illegible] indicate or did your notes indicate [illegible] Miller has any prior criminal activity?

A He told me that he had no prior legal difficulties.

Q Doctor Merin, with respect to your tests, [illegible] the results of those tests that you administered, [illegible] given any indication of Mr. Miller's propensity for violence?

A Yes.

Q Could you explain that to the jury?

A Yes. There are several characteristics in Mr. Miller that interested me and more or less surprised me [illegible] reviewed them. Mr. Miller's propensity for violence seems more from the climate and the people around him than [illegible] something innate or internal in himself. That is, if he surrounds himself or is surrounded by persons who are [illegible] or who are destructive or are violent [illegible] probability is very great that he will [illegible] those principles. On the other hand, if he principles himself

A

Q What tests were those?

A There [illegible] series of [illegible] including a clinical interview and the history [illegible] directly from Dr. [illegible] the Bender technique, [illegible] popularly known as the human figure [illegible] test; the [illegible] personality [illegible] the Peabody picture vocabulary test; the Bender Gestalt visual motor [illegible] the adult sentence completion test.

Q Sir, total hours, how long did you spend with Dr. Miller and how long did anyone with him spend?

A I spent approximately two hours with Dr. Miller and my assistant spent an additional two hours. Following that required perhaps another three hours for scoring and my interpretation of the examination.

Q With respect to your assistant, was that person giving some of these tests?

A Yes, the tests that I allow the assistant to give are simply those that require the -- really does not require anyone, perhaps be a ninth grade education. For test is simply to present to the subject a piece of paper and a pencil and the subject is told precisely what to put on the paper. That is, they're given instructions [illegible] the scoring of the test booklet and how to mark the [illegible] report is made on the part of my assistant to interpret [illegible]

MR. H[illegible]

Q Do you know one Earnest [illegible]?

A Yes,

Q Do you see him in the [illegible] today?

A Yes,

Q Could you please point to him, describe [illegible] what he's wearing?

A Yes. He's the man sitting over here to my right, has a light blue shirt on and what appears to be either light blue or gray trousers. He has blond straight hair.

MR. HERSCH: Thank you. Your Honor, may the record reflect that Doctor has identified the defendant, Earnest Miller?

THE COURT: Yes, sir.

MR. HERSCH:

Q Doctor, did you have occasion to come in contact with Earnest Miller?

A Yes, I have.

Q And when was that?

A That was on November 11th, 1979.

Q And where was that?

A That was in the Pasco County Jail here in [illegible].

Q And when you were in the Pasco County Jail here in [illegible] City, did you administer or cause to be administered any tests to him?

...ership as a full year in a mental hospital. And after ... he must be under the supervision of someone else for ... and at five ... before he can practice on his ... in psychology. So overall ... English may have ... in the undergraduate ... the use of psychological techniques, but not in the use ... drugs. The psychiatrist may have three or four years ... capable and qualified to use drugs.

Q Thank you, Doctor. Doctor, how many times have you ... certified in Court?

A Oh, perhaps six hundred to seven hundred times.

Q And were you qualified those times as an expert?

A Yes.

Q In what field were you qualified as an expert?

A In both criminal and civil situations in both state, ... county, juvenile and federal courts.

MR. FISCH: Your Honor, at this time I would tender Doctor Herin to the Court as an expert in the field of psychology and allow him to be able to give opinions with respect to his training.

THE COURT: Any objections or voir dire, Mr. Boyd?

MR. BOYD: No, sir.

THE COURT: Doctor Herin will be considered to be an expert in the field of psychology.

MR. FISCH: Thank you.

MR. [illegible] I'll stipulate [illegible] expertise. I'm familiar [illegible] free provide [illegible]

[illegible] you accept [illegible]

[illegible] No, sir.

[illegible] go ahead, Mr. [illegible]

[illegible]

Q Doctor Berlin, with respect to your professional [illegible] state your qualifications and education?

A Yes. I received my bachelor of science degree in psychology from the Pennsylvania State University and my master's degree in psychology from Temple University and my doctorate in psychology from the Pennsylvania State University. I served at the Elgin State Hospital in Illinois, came to Florida with the Child Guidance Clinic in Pinellas County from 1958 to 1959. And then from 1959 to 1960 I joined a group of psychologists in Tampa. And from 1960 to 1964 I was the chief psychologist for a group of psychiatrists in Tampa. From 1964 to the present time I have been in independent private practice. I'm an adjunct professor of psychology at the University of South Florida and have been an assistant clinical professor of psychiatry at the medical school at the University of South Florida. I was diplomated in clinical psychology [illegible] Professional Board of [illegible] have sat on the Florida State Board of [illegible] and I'm a past president [illegible]

[illegible]

A.UPON,

SIDNEY J. M[illegible]

[illegible] being first duly [illegible] examined and

[illegible] as follows:

MR. [illegible]: May it please [illegible]

THE COURT: Mr. Hersch.

DIRECT EXAMINATION

BY MR. HERSCH:

Q Would you state your name, please?

A Yes. Doctor Sidney J. Merin.

Q Before we go any farther with respect to your

[illegible] copy I would ask that pursuant to the rules

[illegible]

MR. [illegible]: Objection, Your Honor.

MR. HERSCH: Just [illegible] the witness so that

won't be a problem.

THE COURT: I thought that already happened.

MR. HERSCH: Yes, sir. I just wanted to remind him.

THE COURT: I don't think you need to do it.

MR. HERSCH: Fine.

BY MR. HERSCH:

Q Where do you live, Doctor?

A [illegible] Raisel, Tampa, Florida.

Q What is your profession?

A I'm a clinical psychologist.

examination. That is done by myself.

Q Doctor, you indicated you took a history from him?

A Yes.

Q Does it indicate his age?

A Yes. Mr. Miller is twenty-three years of age.

Q Indicate his marital status?

A Yes. He told me he was married, that he had been separated from his wife for about the past year or so.

Q Did it indicate or did your notes indicate whether Mr. Miller has any prior criminal activity?

A He told me that he had no prior legal difficulties.

Q Doctor Merin, with respect to your tests, within the results of those tests that you administered, were you given any indication of Mr. Miller's propensity for violence?

A Yes.

Q Could you explain that to the jury?

A Yes. There are several characteristics in Mr. Miller that interested me and more or less surprised me when I reviewed them. Mr. Miller's propensity for violence seems to stem more from the climate and the people around him than from something innate or internal in himself. Thereby, if he surrounds himself or is surrounded by persons who are antisocial or who are destructive or who are violent, the probability is very great that he will take on these characteristics. On the other hand, if he surrounds himself